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Supreme Court of the United States

No. 707 October Term, 1940

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THE CITY OF NEW YORK,
Petitioner,
against
THE UNITED STATES OF AMERICA and WAYNE C. TRACE as assignee for the Benefit of Creditors of Long Island Sash & Door Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

Application of U. S. R. S. § 3466 to claims arising out of operations of Federal Housing Administrator. Whether principles of *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, and *United States* v. *Marxen*, 307 U. S. 200, should not have led to denial of priority, as dissenting Judge below thought.

January 18, 1941.

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Supreme Court of the United States

No. . October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

THE UNITED STATES OF AMERICA and WAYNE C. TRACE as assignee for the Benefit of Creditors of Long Island Sash & Door Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable the Supreme Court of the United States:

The petition of the City of New York respectfully shows:

1. Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

2. In a certain proceeding in the Supreme Court of the State of New York, Queens County, known as *In the Matter of the General Assignment for the Benefit of Creditors of Long Island Sash & Door Corporation,* claims were duly filed by the United States of America and by your petitioner, as well as by other persons whose interests are, however, of no present relevance. The respondent Trace is the assignee of the debtor corporation.

3. The claim of the City of New York was allowed in the sum of $1200. Of this sum $1000 represented a claim for sales taxes imposed under one of the City's emergency relief local laws, while $200 represented a claim for business

taxes imposed under another of these local laws. The claim of the United States of America arose out of the activities of the Federal Housing Administrator who had insured certain notes given to a bank by the insolvent and who prior to the general assignment for benefit of creditors had caused the bank to assign the notes to the United States. This claim was allowed in the sum of $1,042.40.

4. On November 26, 1940, after proceedings duly had according to law, the Court of Appeals of the State of New York (being the highest Court of the State) affirmed an order of the Appellate Division of the Supreme Court, Second Department, the effect of which was to award the United States of America priority over the City of New York. One of the Judges of the Court of Appeals (CONWAY, J.) dissented on the authority of *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, and *United States* v. *Marxen*, 307 U. S. 200.

5. On January 7, 1941, the Court of Appeals amended its remittitur to show that its decision rested on federal grounds alone, *i. e.*, that U. S. R. S. § 3466 (U. S. Code, tit. 31, § 191) compelled them to hold as they did. See par. 11, *post*.

Jurisdiction and Timeliness.

6. The petition is made under U. S. Code tit. 28, § 344, subd. (b), and the Court has jurisdiction to grant the writ. *Industrial Accident Commission of California* v. *Davis*, 259 U. S. 182 (1922); *State Industrial Comm. of N. Y.* v. *Nordenholt Corp.*, 259 U. S. 263 (1922); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. (Dec. 16, 1940).

7. The decision of the Court of Appeals was handed down November 26, 1940 (284 N. Y., mem. p. 145). The remittitur was amended January 7, 1941, and in its amended

form was filed in the office of the County Clerk of Queens County on or about January 15, 1941. The County Clerk is the Clerk of the Supreme Court of the State of New York, Queens County, and the amended remittitur is accordingly in the custody of the Supreme Court. A final order of the Supreme Court, Queens County, was entered upon the amended remittitur on January 15, 1941.

8. In the court of first instance, your petitioner prevailed, and on the settlement of the final account of the assignee, payment to creditors out of the assets of the insolvent was ordered to be made in the following order (R., 7):

> "ORDERED, that out of the balance in the hands of the Assignee, amounting to the sum of $561.70, said Assignee be, and he is hereby directed to pay to himself the sum of $35.00, as and for his fees as Assignee, and the sum of $250.00 to Leon Epstein, as attorney, as and for the services rendered on behalf of the said Assignee, and it is further
>
> ORDERED, that the balance of the moneys then remaining in the hands of the Assignee, be and it hereby is directed to be distributed as follows: The sum of $18.73 to Lester Mendell & Co.*; the sum of $140.23 to the United States of America; and the balance to the City of New York, * * *."

9. In the Appellate Division, Second Department, an order of modification was entered, upon a *per curiam* opinion (reported in 259 App. Div. 688, reprinted *post*, p. 22), to the effect that instead of paying $140.23 to the United States and the balance to the City of New York, the assignee should hand over the balance to the United States.

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* This company was accorded priority because they had shipped goods to the insolvent on consignment to be sold by the insolvent as their agent.

10. The Court of Appeals affirmed without opinion but with the following memorandum:

> "Order affirmed, without costs. No opinion. All concur except Conway, J., dissents on the authority of *United States* v. *Guaranty Trust Co.*, 280 U. S., 478, and *United States* v. *Marxen*, 307 U. S., 200."

11. The amendment of the remittitur was accompanied by the following memorandum:

> "Motion to amend remittitur granted. Return of remittitur requested and when returned it will be amended by adding thereto after the words 'affirmed with costs', the following: 'upon the sole ground that the provisions of Section 3466 of the United States Revised Statutes create in the United States of America a priority superior to that enjoyed by the City of New York, and upon no other grounds.'"

Statutes Involved.

12. We are not concerned with the construction or with the constitutionality of any State or local laws, and their text, we assume, need not be set out *in extenso*. Suffice it to say that under the authority of an Enabling Act (New York Laws of 1934, ch. 873), the City, by local laws, imposed in 1934 (and thereafter renewed annually) a series of emergency taxes for the relief of unemployment. One of these local laws imposed a sales tax and has been familiar to this Court since the argument and decision last year of a group of cases of which the best known is *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940). The insolvent was found to be indebted to your petitioner in the sum of $1,000 on account of sales taxes. Another of these local laws imposed a tax for the privilege of carrying on in the City of New York any

trade, profession or commercial activity (with exceptions not here pertinent), and the insolvent was found to be indebted to your petitioner in the sum of $200 on account of these so-called business taxes. The United States of America does not object to the allowance of the City's claims but merely asserts its own greater priority over the City.

13. The United States of America was empowered by the National Housing Act (48 Stat. 1246), as amended * to insure banks and other institutions

> "against losses which they may sustain as a result of loans and advances of credit and purchases of obligations representing loans and advances of credit, made by them subsequent to the date of enactment of this Act and prior to January 1, 1936, or such earlier date as the President may fix by proclamation, for the purpose of financing alterations, repairs, and improvements upon real property."

14. The proofs of claim alleged that the National City Bank of New York was the holder of two promissory notes executed by the assignor (R., 24-25 and 33-35), the amounts of which represented loans and advances of credit by the National City Bank to the assignor for the purpose of financing alterations, repairs, improvements and additions upon real property, and the purchase and installation of equipment and of machinery on real property (R., 20, 29); that the National City Bank applied for and obtained from the Federal Housing Administrator insurance against

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* Amended in respects of only slight materiality for present purposes by 49 Stat. 293; 49 Stat. 684, §§ 208, 308 and 344; 49 Stat. 1187; 49 Stat. 1232; 49 Stat. 1648, §§ 14 and 26; 50 Stat. 20; 50 Stat. 70; 53 Stat. 804. Certain of the amendments are analyzed in *United States* v. *Marxen*, 307 U. S. 200, 203 (1939).

losses which it might sustain as a result of loans and advances of credit for the purposes just mentioned; that at a time when $339.48 was due on one note and $800.04 was due on the other (R., 22, 31), the assignor defaulted in its obligations, so that, the notes having been assigned by the National City Bank to the United States of America, the United States became a creditor of the Long Island Sash & Door Corporation in the net sums (after credit for partial payments) of $316.60 on one note and $725.80 on the other note (R., 23, 32).

15. The claims filed by the government then make reference to § 3466 of the United States Revised Statutes, which reads as follows:

> "§ 3466. **Priority Established.** Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

16. The contention was thereupon made (R., 23, 32) that the statute applied to debts arising under the National Housing Act, whenever the United States had taken assignments to protect itself from losses upon insured obligations.

Opinions Below.

17. The Appellate Division, Second Department, whose opinion is given in full in an Appendix, *post,* p. 22, awarded priority to the United States, stressing, in doing so, the circumstance that the debts were assigned to the United States prior to the insolvency. They said (R., 46):

> "In any event, the United States of America is entitled to priority upon these claims in view of the fact that the assignments of the claims and the notes given as security were made to the United States and were in its name at the time the borrower made the general assignment for the benefit of creditors. Under section 3466, the priority of payment does not depend upon how the United States acquired title to the notes, nor upon their status prior to the transfer."

18. The memoranda handed down by the Court of Appeals (no opinion being written) were set out *ante,* pars. 10 and 11.

Summary Statement of the Matter Involved.

19. Since, but for the superior priority awarded to the United States, the City would have been paid as a prior creditor ahead of general creditors under the decision in *Matter of Atlas Television Co.,* 273 N. Y. 51 (1936), cited and followed in *New York City* v. *Goldstein,* 299 U. S. 522 (1937), the basic question presented is whether U. S. R. S. § 3466 applies to claims which arise in the United States as a result of the operations of the Federal Housing Administrator. Your petitioner, as will more fully appear from the annexed brief, contends that it should not, since the purpose of the National Housing Act would be thereby defeated—it being manifest that no builders or supply men would ad-

vance funds to repair or erect buildings if on the insolvency of the person for whom the building was being erected or to whom the supplies were being furnished, these creditors would not participate in the estate save after the United States had been paid in full. Arguments along these lines have the sanction of this Court. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478 (1930), denying priority where the bases of the indebtedness were advances under the Transportation Act (41 Stat. 456), §§ 207-210.

Question Presented.

20. The question presented is: Does U. S. R. S. § 3466 apply to debts owing to the United States as a result of operations of the Federal Housing Administrator?

Assignment of Errors.

21. Your petitioner submits that the Court of Appeals erred in giving an affirmative answer to the foregoing question.

Reasons for Allowance of Writ.

22. The question whether priority is enjoyed by the United States as to claims residing in it as a result of the operations of the Federal Housing Administrator has never been passed upon by this Court. The existence of the question was acknowledged in *United States* v. *Marxen*, 307 U. S. 200 (1939), but the question was not squarely raised nor decided, since the assignment of the insured banks' claims to the United States in that case took place *after* the general assignment for benefit of creditors.

23. The foregoing question is of wide public importance since the Federal Housing Administrator carries on activities in every State in the Union. It is no exaggeration to say that it is involved in thousands of proceedings under state insolvency statutes. The affirmative answer to the question given below seems calculated to defeat the congressional intent to combat unemployment in the building industry, since it discourages builders and supply men from dealing with property owners whose notes to banks have been insured under the National Housing Act. And see par. 19, *supra*. That the element of public importance attaching to a case is a reason for granting certiorari was stated specifically in *Graves* v. *Elliott*, 307 U. S. 383, 386 (1939); *Wisconsin* v. *J. C. Penney Co.*, *ante*, p. 2.

24. The decision below, though in accord with cases in intermediate federal courts (*e. g.*, *Wagner* v. *McDonald*, 96 F. [2d] 273 [8th Circ., 1938] and *Korman* v. *Federal Housing Administration*, 113 F. [2d] 743 [App. D. C., 1940]) and with a Washington case (*In re Dickinson's Estate*, 197 Wash. 145, 84 Pac. [2d] 661 [1938]), seems in conflict with *United States* v. *Guaranty Trust Co.*, 280 U. S. 478 (1930). The law, therefore, is still unsettled, and the profession stands in need of a determination of the question in this Court.

25. There is no square decision in this Court, as far as counsel have been able to discover, awarding the United States priority under U. S. R. S. § 3466 where the claim exists in the United States by way of assignment from the original obligee. The authorities cited in the opinion of the Appellate Division, *post*, p. 23, are *dicta* merely.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New

York, in and for the County of Queens, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause to the end that the case may be reviewed and determined in this Court, as provided in 28 U. S. C. A., § 344, subd. (b); and that the final order and determination of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order and determination, awarding to the United States of America a priority superior to that of your petitioner, may be reversed; and your petitioner prays for such other and further relief as to this Court may seem just and proper, and your petitioner will ever pray.

New York, N. Y., January 18, 1941.

THE CITY OF NEW YORK,
Petitioner,

By WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
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New York, N. Y.

Supreme Court of the United States

No. . October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

THE UNITED STATES OF AMERICA and WAYNE C. TRACE as assignee for the Benefit of Creditors of Long Island Sash & Door Corporation.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The case involves the application of U. S. R. S. § 3466 to claims arising in the United States of America out of the activities carried on by the Federal Housing Administrator. A bank creditor of the insolvent (of whom respondent Trace is assignee for benefit of creditors), having had the notes of insolvent held by it insured under the National Housing Act (see Petition, par. 13), assigned these notes after default to the United States of America. Claims for the unpaid balance were filed with respondent Trace by the United States, and priority asserted for them. Claims were also filed for emergency taxes owing by the insolvent to your petitioner, and priority asserted for them. As to each class, the claimed priority was granted, but the United States was given a superior priority in deference to what the Court of Appeals thought to be the requirements of U. S. R. S. § 3466.

Whether, considering the purposes for which the National Housing Act was passed—the relief of unemployment in the building trades—§ 3466 should have been held applicable, is the question presented. No other basis for the government's priority than this statute exists. *United States* v. *State Bank of North Carolina*, 6 Peters 29, 35 (1832).

1. Priority under § 3466 should be denied where, because of the commercial character of the transaction giving rise to the claim, an award of priority would be unjust.

The large group of cases decided in the decade following the close of the first World War reveal a reluctance on the part of this Court to permit the federal government, engaged in commercial ventures, to claim priorities which other creditors of insolvents would not enjoy. Thus in *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236 (1926), this Court denied priority to the claim of the Director General of Railroads for transportation charges and for the conversion of goods shipped, saying (p. 239):

> "In some matters, at least, under § 10, the United States stand exactly as if they were a railroad corporation operating as a common carrier. *Director General* v. *Kastenbaum*, 263 U. S. 25, 28. As said in *Davis* v. *Pullen*, 277 Fed. 650, 655, 'there is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents.' And we think that the indicated purpose of Congress will be best carried out by construing the relevant statutes, so far as may be, with the gen-

> eral intent to preserve the substantive rights of all parties concerned as they would have existed but for federal control." *

In *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549, 570 (1922), it was held that debts due the Fleet Corporation were not debts due the United States.

In *Davis* v. *Pringle*, 1 F. (2d) 860 (4th Circ., 1924), aff'd 268 U. S. 315 (1925), the Circuit Court of Appeals said (p. 864):

> "* * * the contractual operations of the federal government and of the states have become so extensive and so involved with the business of private citizens that priority to the federal government and to the states, except for taxes, would operate as an oppressive hardship on other creditors of bankrupts."

In *Commonwealth* v. *Phoenix Bank*, 11 Metc. 129 (Mass., 1846), certain army pursers and recruiting officers deposited money (entrusted to them in their official capacity) in a bank which became insolvent. The government claimed priority, insisting that the deposits were debts due the United States. The Court, in an opinion by Chief Justice SHAW, held against the government, and at the very outset of its opinion declared (p. 147):

> "Claims to a preference and payment in full are not favored by any considerations of equity. The general rule is, that when several creditors are entitled to payment from a fund insufficient to satisfy the whole, they shall share in proportion. This rule

* Section 10 of the Federal Control Act (40 Stat. 451), subjected the Director General as an operator of common carriers to all applicable state laws, and expressly forbade the urging of federal control as a ground for the removal of causes from state to federal courts.

of equity may be controlled by a provision of positive law. In such case all the creditors will not be equally entitled to be paid in full, and equity must yield to the law. But in order to establish such a preference, it must be made plainly to appear that the case is within the rule of law that secures such preference."

2. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, is a precedent for inquiring into the purpose of the statute under which were carried on the operations giving rise to the claim; and the purpose of the statute there involved is sufficiently similar to that at bar to convict the Court below of error in refusing to follow it.

(a)

With the background provided by the cases cited, we come now to the National Housing Act (48 Stat. 1246), and the status under § 3466 of claims against the insolvent assigned to the United States. The assignments, of course, were taken after the United States had discharged the obligations assumed by it when, under the provisions of the Act quoted *supra*, p. 5, it had insured against loss a certain institution which had made loans to the insolvent.

A good statement of the purposes behind the National Housing Act is found in 78 Cong. Rec. (part 10) p. 11194, where Representative REILLY said:

> "Now, why should the Government go into the business of guaranteeing to any extent money loaned by bankers or other financial institutions to a citizen to repair or remodel his home, and why should the Government be interested in insuring existing mortgages and mortgages placed on homes to be built?

> The answer is that the Government is interested, deeply interested, in providing work for the 5,000,000 mechanisc [*sic*] of the country who formerly found employment in the building industry, but who are now, and have been for some time, out of work."

A similar statement as to the purposes of the bill was made by Representative Steagall at p. 11191 of the Congressional Record, a statement entitled to especial respect because it was he who introduced the bill in the House of Representatives and assumed responsibility for its passage.

(b)

The Federal Housing Administration is, it would seem, endowed with all the prerequisites of separate corporate entity, and was, in fact, listed by this Court in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 (1939), among the corporations which Congress had recently "spawned".* Thus under § 1 of its organic act, as amended by 49 Stat. 684, § 344, the Administration may sue and be sued. It may, under § 1, appoint its own personnel and fix their tenure and compensation without regard "to other laws applicable to the employment and compensation of officers and employees of the United States". It may, under § 1, make its own contracts for rent, services and supplies "without regard to any other provisions of law governing the expenditure of public funds". It enjoys limited liability, being prohibited by § 2 (as amended by 49 Stat. 1187) from incurring liability for insurances of loans beyond $100,000,000. And it has its own seal (Executive Order No. 7058 of May 29, 1935).

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* See footnote 3, page 390, especially the first line of this note, as carried over to page 391. And see *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 245 (1940).

While in the instant case the United States of America is the claimant, yet the applicability of § 3466 is affected, as we have shown, by the purpose of the statute under which the government advanced the money, and by the circumstance that the government has seen fit to limit its own participation in commercial enterprises by setting up a separate entity as the instrumentality by which such participation is brought about.

This Court recognized the capacity of the factor of separate entity to militate against a claim to priority, when it included the following *dicta* in its opinion in *United States* v. *Marxen*, 307 U. S. 200 (1939), at page 203:

> "Although an amendment of the National Housing Act authorized the Administrator to sue and be sued in any court of competent jurisdiction, state or federal, it is not necessary in answering the present certificate to determine whether by this addition the Congress intended to give the Administrator the status of a corporation or other entity distinct from the United States and by such status, to confer on or withhold from claims of the Federal Housing Administration against bankrupts the advantages of § 3466. We can deal only with a claim of the Federal Housing Administration assigned to the United States after the adjudication in bankruptcy of the obligor. It is assumed that such a claim belongs to and is made by the United States."

Another case passing upon the powers of the Federal Housing Administration and tending in effect to hold that it was not by any means to be deemed wholly identified with the sovereign, is *Federal Housing Administration* v. *Burr*, 309 U. S. 242 (1940). This Court there held that the government had no right to read into the act amending the act creating the Federal Housing Administration an exception to the suability there sanctioned (49 Stat. 722), so as to

protect the Federal Housing Administration against garnishment proceedings in a state Court. This Court apparently was of opinion that the holding reached by the Court below (which was affirmed) would not lead to such interference with the federal functions of the Administration as would make it the duty of this Court to come to its rescue.

(c)

The purpose to strengthen the borrowing power of persons desiring to carry out building programs is manifest from the debates referred to as well as from the Act itself. It is just as manifest as was the intent to rehabilitate the credit of the railroads, on which this Court dwelt at length in *United States* v. *Guaranty Trust Co., supra.* There the government had loaned sums of money to the Minneapolis & St. Louis Railroad in 1920, upon the termination of federal control. Authority to make the loans was conferred by the Transportation Act (41 Stat. 456), §§ 207, 209 and 210. There was evidence that at the time the Act was passed the credit of many carriers was seriously impaired. Priority was denied when the carrier in question later went into receivership, on the ground that to concede priority would defeat the congressional intent to aid the railroads in strengthening their credit. This Court said (280 U. S., at p. 485):

> "To have given priority to debts due the United States pursuant to Title II, would have defeated the purpose of Congress. It not only would have prevented the reestablishment of railroad credit among bankers and investors, but it would even have seriously impaired the market value of outstanding railroad securities. It would have deprived the carriers of the credit commonly enjoyed from supplymen and others; would have seriously embarrassed the car-

riers in their daily operations; and would have made necessary a great enlargement of their working capital. The provision for loans under § 210 would have been frustrated. For, carriers could ill afford voluntarily to contract new debts thereunder which would displace, *pro tanto,* their existing bonded indebtedness. The entire spirit of the Act makes clear the purpose that the rule leading to such consequences should not be applied.

Moreover, Congress evidenced unmistakably its purpose to rely, for obtaining payment of the Government's advances, upon means other than the priority provided for by § 3466."

3. The questions left open in *United States* v. *Marxen,* 307 U. S. 200, are present and determinative of the instant case. They are of public importance and certiorari should issue so that they may be answered.

(a)

There have been no decisions in this Court passing upon the applicability of § 3466 to claims under the National Housing Act assigned to the United States prior to the making of the general assignment or the filing of the petition in bankruptcy; nor are there any decisions, so far as counsel can discover, awarding priority where the government has acquired the claim by assignment from the original obligee. Of course there is no priority when the assignment to the government is shown to have been a supervening event. *United States* v. *Marxen,* 307 U. S. 200 (1939). But in this case this Court said that the United States "has priority, *if at all,* by virtue of the general provisions of § 3466, as recognized by § 64(b) (7) of the Bankruptcy Act." (Italics

ours.) The Court then added, by way of *dictum* to be sure, some cautionary observations on the necessity of heeding *the purpose of the statute* under which the government's claim arose. The Court said (pp. 206-207):

> "But this principle of construction is subject to the limitation that the generality of the language of the section is restricted by the purpose to grant priority to the United States, only, *and by legislative intention, as shown by other statutes.* Consequently priority was refused to corporations wholly owned by the United States * and to the Director General of Railroads because § 10 of the Federal Control Act manifested an intention that the carriers under federal control should be treated as before their transfer to federal operation.† The United States itself when it sought priority for its loans under the Transportation Act was denied the benefits of § 3466 because the intention to build up the credit standing of the railroads was inconsistent with the claimed priority."‡ (Italics ours.)

We suggest (we cannot, of course, be dogmatic) that this language was inserted in the opinion to intimate the Court's unwillingness to sanction a claimed priority where to do so would defeat the purpose of the National Housing Act.

(b)

We find nothing hostile to the foregoing in *United States* v. *Summerlin*, 310 U. S. 414 (1940). This Court there held that a debt owing to the Federal Housing Administrator under the National Housing Act was a debt on which the United States itself had the right to sue and hence to be freed of such impediments as might be imposed by state

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* *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 570. Even though private parties might have participated in stock ownership under the law. See p. 565.

† *Mellon* v. *Michigan Trust Co., supra*, 271 U. S., at p. 240.

‡ *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 485-486.

statutes of limitations. From this the Court in *Korman* v. *Federal Housing Administration,* 113 F. (2d) 743 (App. D. C., 1940), inferred that § 3466 was applicable. But in claims arising out of federal control of railroads an exactly similar ruling was made as to state statutes of limitations in *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462 (1924), and yet this Court later refused to extend § 3466 to the Director General of Railroads in *Mellon* v. *Michigan Trust Co.,* 271 U. S. 236 (1926), *ante,* page 12.

(c)

Another argument against holding § 3466 to apply is that, since the banks have no right to appeal to the government to make good on its insurance contracts until the borrower has been in default 60 days (Regulation 15, printed at R., 21), and since the government cannot invoke § 3466 if the debtor has already made a general assignment before the government acquired the claim, the effective operation of § 3466 in favor of the government is dependent upon the purely speculative possibility that the government took its assignment during the narrow interval of time between a sixty-day default and the debtor's general assignment or bankruptcy.

Actually the regulations encourage banks to wait as long as a year before appealing to the government; or if 10% has been paid on account, the banks may wait still longer (R., 21). Thus the hazard is great that the debtor will make a general assignment or be thrown into bankruptcy before the government is called in (and hence before the government could receive an assignment from the banks). A priority dependent on split-second timing is a phenomenon unworthy of judicial recognition.

Conclusion.

The extension of U. S. R. S. § 3466 to claims upon commercial paper insured under the National Housing Act and assigned to the government after it has had to make good losses sustained by the holder, has little to commend it to a tribunal endowed with a capacity to appreciate realities. We have seen (*ante*, pp. 14-15) that the object of the National Housing Act was to aid in combatting unemployment by encouraging the employment of mechanics affiliated with the building industry. No contractor would risk contracting with a home owner, known to be operating with borrowed capital, if he knew that, upon the home owner's failure to meet his obligations, the contractor could not hope to share in the insolvent estate but would have to sit idly by and see the government, with a capital claim and not a mere claim for taxes, take all the assets. We should not impute to Congress the ineptitude of aiding building enterprises with one hand and inflicting on them likelihood of loss with the other. Moreover, the result below, by causing losses (and even possible bankruptcy) to builders and contractors, would actually tend to increase the very unemployment which Congress so studiously aimed to diminish. *United States* v. *Guaranty Trust Co., supra*, p. 17, is ample authority for rejecting the literal application of § 3466 in the interest of avoiding unjust or absurd results. We urge the Court to acknowledge the force of its analogy.

The Petition for Certiorari should be granted.

January 18, 1941.

Respectfully submitted,

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Corporation Counsel,
Attorney for Petitioner.

PAXTON BLAIR,
SOL CHARLES LEVINE,
CHARLES H. BIRDSALL,
of Counsel.

APPENDIX.

Opinion of Appellate Division (Reported in 259 App. Div. 688.)

SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

IN THE MATTER

of the

General Assignment for the Benefit of Creditors of LONG ISLAND SASH & DOOR CORPORATION,

Assignor,

to

WAYNE C. TRACE,

Assignee.

UNITED STATES OF AMERICA,

Claimant-Appellant,

CITY OF NEW YORK,

Claimant-Respondent.

June 17, 1940.

Appeal by the United States of America from an order of the Supreme Court (WENZEL, J.), entered in the office of the clerk of Queens County on the 2d day of October, 1939.

Mario Pittoni (*Harold M. Kennedy,* United States Attorney, Eastern District of New York, and *Vine H. Smith* with him on the brief) for the appellant.

Charles H. Birdsall (*William C. Chanler,* Corporation Counsel, and *Sol Charles Levine* with him on the brief) for the respondent.

Appendix

PER CURIAM:

Appeal by United States of America from an order in so far as it denies to it priority on its Federal Housing Administration claims of $725.80 and $316.60, and allows the respondent, the City of New York, priority over appellant on its sales and business tax claims.

In our opinion Federal Housing Administration claims are entitled to priority of payment under section 3466 of the Revised Statutes (U. S. Code, Tit. 31, § 191) where, as in the instant case, the debts were assigned to the United States prior to the insolvency. (See *Wagner* v. *McDonald,* 96 F. [2d] 273; *Matter of Wilson,* 23 F. Supp. 236; *Matter of Wilson, Inc.,* 24 id. 651.) In *Korman* v. *Federal Housing Administrator* (113 F. [2d] 743) the United States Court of Appeals for the District of Columbia held that a claim owned by the Federal Housing Administration at the time a petition in bankruptcy was filed is a "debt due to the United States" within the meaning of the statute. In any event, the United States of America is entitled to priority upon these claims in view of the fact that the assignments of the claims and the notes given as security were made to the United States and were in its name at the time the borrower made the general assignment for the benefit of creditors. Under section 3466, the priority of payment does not depend upon how the United States acquired title to the notes, nor upon their status prior to the transfer. Priority results merely from the insolvency of the debtor and the ownership of the claim by the United States. (*Wagner* v. *McDonald, supra; Howe* v. *Sheppard,* 12 Fed. Cas. 672, No. 6772, 2 Sumn. 133; *Lewis* v. *United States,* 92 U. S. 618; *United States* v. *Fisher,* 6 id. [2 Cranch] 358.)

Appendix

The order should be modified by striking from the third ordering paragraph the words "the sum of $140.23 to the United States of America; and the balance to the City of New York," and inserting in place thereof the words "and the balance to the United States of America." As thus modified, the order, in so far as appealed from, should be affirmed, without costs.

LAZANSKY, P. J., HAGARTY, JOHNSTON, TAYLOR and CLOSE, JJ., concur.

Order modified by striking from the third ordering paragraph the words "the sum of $140.23 to the United States of America; and the balance to the City of New York," and inserting in place thereof the words "and the balance to the United States of America." As thus modified, the order, in so far as appealed from, is affirmed without costs.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 707

THE CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, AND WAYNE C. TRACE AS ASSIGNEE FOR THE BENEFIT OF CREDITORS OF LONG ISLAND SASH & DOOR CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Supreme Court of New York (R. 5–8) was entered without opinion. The opinion of the Appellate Division of the Supreme Court of New York (R. 45–47) is reported in 259 App. Div. 688. The memorandum order of the Court of Appeals (R. 50–51) is reported in 284 N. Y. 145.

JURISDICTION

The order of the Court of Appeals was entered November 26, 1940 (R. 50). The petition for a

writ of certiorari was filed January 21, 1941. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION INVOLVED

Whether a debt owned by the United States, acquired, by assignment from a financial institution insured under Title I of the National Housing Act, prior to the debtor's general assignment for the benefit of creditors, is entitled to priority under Section 3466 of the Revised Statutes.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra,* pp. 9–11.

STATEMENT

On February 15, 1939, the Long Island Sash & Door Corporation, being insolvent, made an assignment for the benefit of creditors to respondent Trace (R. 9–13). Theretofore the corporation had executed two promissory notes payable to the National City Bank of New York, a financial institution insured by the Federal Housing Administrator under the National Housing Act (R. 24–25, 33–34). The corporation defaulted in its payments of these notes, and, on June 27, 1938, the Federal Housing Administrator, by draft drawn on the Treasurer of the United States, reimbursed the National City Bank for the unpaid balances (R. 22–23, 31–32). The notes in question were

assigned to the United States by the National City Bank (R. 26, 35). The United States thereafter filed proof of claim in the assignment proceedings in the amounts of $316.60 and $725.80, for the unpaid balances due it on the notes (R. 19, 28).

Petitioner, the City of New York, likewise filed proof of claim in the assignment proceedings for certain sales and business taxes in the amount of $1,200.00 owed to it by the corporation (R. 17).

In confirming the account of the assignee, which disclosed a balance on hand of $561.70, the Supreme Court of New York, County of Queens, after directing the payment of certain fees and other claims concerning which there is no controversy, entered an order directing that the balance of the assets in the hands of the assignee be paid to the City of New York (R. 7). On appeal the Appellate Division of the Supreme Court modified the order of the Supreme Court and granted priority to the claim of the United States for the debt owing to it on account of the assignment of the notes in question (R. 43–44). On appeal the Court of Appeals affirmed, one judge dissenting (R. 50–51). On January 7, 1941, the Court of Appeals on motion of the petitioner amended the remittitur by stating that the sole ground upon which it based its affirmance was that the provisions of Section 3466 of the Revised Statutes of the United States create in the United States a priority superior to that enjoyed by the City of New York (R. 56).

ARGUMENT

Petitioner contends that the Court of Appeals of New York erred in holding that the claim of the United States in question is entitled to any priority [1] under Section 3466 of the Revised Statutes, because it was assigned to the United States by a financial institution insured under the National Housing Act and that the purpose of that act would be defeated if priority were granted to the claims of the United States. It urges that the reasoning of this Court in *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, supports this contention. Alternatively, it argues that in any event the question is one of importance which has not been but should be decided by this Court.[2] We submit that the decision below accords with the

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[1] The petitioner does not question that the debt due the United States in the instant case, if entitled to priority at all, should be paid before the debt due it.

[2] Petitioner suggests (Br. 15–17) that the Federal Housing Administration or the Federal Housing Administrator is a separate legal entity and that a claim of such a separate legal entity is not entitled to priority. Cf. *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549, 570. The short answer, however, to that suggestion is that the claim was not assigned to the Federal Housing Administration, but to the United States, thereby becoming a claim of the United States. *United States* v. *Summerlin*, 310 U. S. 414, 416. Even had the claim been assigned to a corporation acting as agent for the United States and not to the corporation as such, it would be entitled to priority. *Whan* v. *Green Star. S. S. Co.*, 22 F. (2d) 483 (C. C. A. 2d), certiorari denied *sub nom. Adams* v. *United States*, 276 U. S. 629.

decisions of this Court and that the question is not now one which calls for review by this Court.

1. The decision below is not in conflict with *United States* v. *Guaranty Trust Co.*, 280 U. S. 478. In that case this Court held that Section 3466 was inapplicable to claims of the United States arising under Title II of the Transportation Act, 1920, which authorized loans to railroads and made specific provisions for security. The Court concluded that to grant priority to such claims would gravely impair the private credit of the railroads and thus defeat the purpose of the Transportation Act "to preserve for the nation substantially the whole existing transportation system" (*id.* at 484), and that the express inclusion by Congress of the provisions for security "evidenced unmistakably its purpose to rely, for obtaining payment of the Government's advances, upon means other than the priority provided by Section 3466" (*id.* at 485). *Cf. Cook County National Bank* v. *United States,* 107 U. S. 445, 449.

The *Guaranty* case has no application here. There is nothing in the language or policy of the National Housing Act which evidences a purpose of Congress that Section 3466 should not apply to claims of the United States acquired under the Act. The Act makes no provision to secure the claims of the United States. And the suggestion that the granting of priority would defeat the policy of the statute is plainly insubstantial. The

avowed purpose of the Act is to provide credit for housing improvements and construction as a means of increasing employment in the building trades. The granting of priority to the United States would in no way discourage private persons from advancing funds for this purpose. The Act authorizes the Administrator to insure loans of financing institutions up to an amount more than sufficient to guarantee against expectable losses.[3] The contractors, material men, and laborers receive payment in cash out of the insured loans and are not required to look to the credit of the home owners for compensation. Home owners who have received one loan under the statutory scheme, may finance additional improvements in the same manner.

Whether the granting of priority to claims of the United States (or to those of the states for taxes) would tend to discourage private persons from ad-

[3] The Act, as originally passed, provided that the Administrator could insure a financial institution in an amount not exceeding 20% of the total amount of the loan made by the institution. By the Act of April 3, 1936, c. 165, 49 Stat. 1187, the loss insured against was reduced to 10% of the total. From the inception of the F. H. A. up to December 31, 1939, the disbursements of the Federal Housing Administration to financial institutions insured under Title I of the National Housing Act amounted to less than 2½% of the total amount loaned. Sixth Annual Report of the F. H. A., p. 5. The financial institution is reimbursed in full for each defaulted note as long as the total amount of all defaults does not exceed 10% of the total of all advances and loans made by the institution under the Act.

vancing credit in connection with risks which cannot be insured under the Act, is a matter for conjecture. It is clear, however, that it was not the purpose of the National Housing Act to improve the general credit of home owners for every conceivable purpose. Moreover, the deterrent effect of granting priority would obviously be less than the reservation of the specific lien or mortgage normally required as security for private advances for improvements or building construction.

2. The question presented is not one of importance requiring a decision of this Court. While this question, like that of the right of a bona fide purchaser of commercial paper to be free from the defense of lack of consideration, is one which may frequently arise, the answer is reasonably free from doubt. The state and lower federal courts have uniformly recognized that the United States is entitled to priority on claims acquired under the National Housing Act before bankruptcy or assignment for the benefit of creditors. *In re Dickson's Estate,* 197 Wash. 145; *Emory* v. *St. James Distillery* (*Mo.*), 143 S. W. (2d) 318;[4] *Wagner* v.

[4] In the *Emory* case the Springfield Court of Appeals of Missouri had held that a claim assigned to the United States through the Federal Housing Administrator was entitled to priority under Revised Statutes 3466, but it further held that wage claims, entitled to priority under a Missouri statute, took priority over a claim of the United States. The Government proposes to seek certiorari to review the decision of the Springfield Court of Appeals in this limited respect.

McDonald, 96 F. (2d) 273 (C. C. A. 8th); *Korman* v. *Federal Housing Administration*, 113 F. (2d) 743 (App. D. C.); Cf. *In re Hansen Bakeries, Inc.*, 103 F. (2d) 665, 666 (C. C. A. 3d); *In re Miller*, 105 F. (2d) 926, 927–928 (C. C. A. 2d); *In re Stamford Auto Supply Co.*, 25 F. Supp. 530, 531 (N. D., Tex.). And the contentions advanced by petitioner for a contrary view appear to be insubstantial. In the absence of a conflict of decision, there is no occasion, we submit, for review by this Court.

CONCLUSION

The decision below is correct. There exists no conflict. We respectfully submit that the petition for a writ of certiorari should, therefore, be denied.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
PAUL A. SWEENEY,
Special Assistants to the Attorney General.

FEBRUARY 1941.

APPENDIX

Section 3466 of the Revised Statutes (U. S. C., Title 31, sec. 191) provides as follows:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Title I of the Act of June 27, 1934, c. 847, 48 Stat. 1246–1247 (U. S. C., Title 12, secs. 1701–1706) provides:

TITLE I. HOUSING RENOVATION AND MODERNIZATION

CREATION OF FEDERAL HOUSING ADMINISTRATION

> SECTION 1. The President is authorized to create a Federal Housing Administration, all of the powers of which shall be exercised by a Federal Housing Administrator (hereinafter referred to as the "Administra-

tor"), who shall be appointed by the President, by and with the advice and consent of the Senate, shall hold office for a term of four years, and shall receive compensation at the rate of $10,000 per annum. In order to carry out the provisions of this title and titles II and III, the Administrator may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, and appoint such other officers and employees as he may find necessary, and may prescribe their authorities, duties, responsibilities, and tenure and fix their compensation, without regard to the provisions of other laws applicable to the employment or compensation of officers or employees of the United States. The Administrator may delegate any of the functions and powers conferred upon him under this title and titles II and III to such officers, agents, and employees as he may designate or appoint, and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for lawbooks and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this title and titles II and III, without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

INSURANCE OF FINANCIAL INSTITUTIONS

SEC. 2. The Administrator is authorized and empowered, upon such terms and con-

ditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies, and other such financial institutions, which are approved by him as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them subsequent to the date of enactment of this Act and prior to January 1, 1936, or such earlier date as the President may fix by proclamation, for the purpose of financing alterations, repairs, and improvements upon real property. In no case shall the insurance granted by the Administrator under this section to any such financial institution exceed 20 per centum of the total amount of the loans, advances of credit, and purchases made by such financial institution for such purpose; and the total liability incurred by the Administrator for such insurance shall in no case exceed in the aggregate $200,000,000. No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan, advance of credit, or purchase by it the face amount of which exceeds $2,000; nor unless the obligation bear such interest, has such maturity, and contains such other terms, conditions, and restrictions, as the Administrator shall prescribe.

U. S. GOVERNMENT PRINTING OFFICE: 1941